

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0605

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SHIRLEY A. GEMAS AND WAYNE O. GEMAS,

PLAINTIFFS-APPELLANTS,

v.

**SUSAN R. MEYER AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

**COMMERCIAL UNION INSURANCE COMPANIES AND
PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Shirley and Wayne Gemas have appealed from a judgment dismissing their claims against Susan R. Meyer and her insurer, State Farm Mutual Automobile Insurance Company. In their action, the Gemases alleged that Shirley suffered a neck injury as a result of an automobile collision with Meyer. The action was dismissed after the jury returned a verdict finding that both Shirley and Meyer were negligent in the operation of their vehicles, but that Meyer's negligence was not a substantial factor in causing Shirley's injuries. We affirm the judgment.

The Gemases' first argument is that the trial court's entry of the amount of past medical expenses in the special verdict constituted a finding as a matter of law that Shirley's injuries were the result of the automobile accident. The Gemases contend that in order to make the finding as to the amount of past medical expenses, the trial court also found as a matter of law that the expenses were the result of the accident. In furtherance of this argument, they rely on the instructions regarding damages which were given the jury which discussed what sum of money would compensate Shirley for the medical expenses which were the result of the accident and informed them that the answer to that question had been stipulated. They also contend that admissions made by Meyer in her response to their request for admissions, in conjunction with her stipulation that the medical expenses were reasonable and necessary, justified finding causation as a matter of law.

While inventive, the Gemases' argument fails. The special verdict submitted to the jurors expressly required them to determine whether Meyer's negligence was a substantial factor in causing Shirley's injuries. The jury answered that question "no." By failing to object to the special verdict, the Gemases waived any objection to submitting the causation question to the jury.

See Clark v. Leisure Vehicles, Inc., 96 Wis.2d 607, 616, 292 N.W.2d 630, 634-35 (1980). In fact, the Gemases consented to the special verdict question by including a causation question in their own proposed special verdict. Similarly, the Gemases requested an instruction regarding causation and the instruction was given. By consenting to the instruction, they waived any claim that the jury should not have been asked to consider causation. *See Air Wis., Inc. v. North Cent. Airlines, Inc.*, 98 Wis.2d 301, 309-10, 296 N.W.2d 749, 752-53 (1980).

If the Gemases believed that the issue of causation had been resolved as a matter of law by Meyer's admissions, they were required to raise that claim at the instruction and verdict conference. Moreover, even examining the premises underlying the Gemases' arguments, their contentions fail. The response to requests for admissions made by Meyer and relied on by the Gemases merely indicated that "with respect to the automobile accident" Shirley required medical treatment and incurred various medical expenses. The response was merely an admission as to the cost of Shirley's medical treatment. It did not contain a clear admission that Meyer's actions and the accident caused the injuries.

The Gemases' claim that the jury instructions as given indicated that the causation question had been decided as a matter of law also lacks merit. Jury instructions must be viewed in their entirety, and even an error in an instruction can be cured by a correct statement elsewhere in the instructions if the overall meaning communicated was a correct statement of the law. *See Zintek v. Perchik*, 163 Wis.2d 439, 460, 471 N.W.2d 522, 530 (Ct. App. 1991); *Leahy v. Kenosha Mem'l Hosp.*, 118 Wis.2d 441, 451, 348 N.W.2d 607, 613 (Ct. App. 1984).

The Gemases correctly point out that in its instructions, the trial court stated that Question 6A asked what sum of money would compensate

Shirley for the damages “*which were the result of such accident*, with respect to medical and hospital expenses.” (Emphasis added.) However, the trial court also expressly instructed the jury that “[p]arties may, as here, agree on an amount of damages without admitting they’re liable therefor.” *See* WIS J I—CIVIL 150. The trial court further instructed the jurors that the agreement between the parties as to the amount inserted by the court for past medical expenses was not to be considered by the jurors as an admission of liability by any party or as an intimation by the court that any party may be liable for one or more of the amounts inserted. Viewed in their entirety, the instructions clearly communicated to the jury that the stipulation regarding medical expenses was not an admission of liability. The Gemases therefore cannot prevail on their claim that causation was resolved in their favor as a matter of law.

The Gemases’ next argument is that the jury’s finding of no causation is not supported by credible evidence and must be set aside. We disagree. When reviewing a judgment entered upon a jury verdict, we must view the evidence in the light most favorable to the verdict and affirm the judgment if there is any credible evidence upon which the jury could have based its decision, particularly where the verdict has the approval of the trial court. *See Tim Torres Enters. v. Linscott*, 142 Wis.2d 56, 67, 416 N.W.2d 670, 674 (Ct. App. 1987). Weighing testimony and evaluating credibility of witnesses are matters for the jury, and when more than one inference can be drawn from the evidence, we must accept the inference drawn by the jury. *See id.*

The Gemases contend that there is no credible evidence in the record which supports a finding that Shirley’s injuries were not caused by the automobile accident. To support this claim they rely on Shirley’s testimony that she suffered pain within a short period of time after the accident and the testimony of Shirley’s

treating physician, Dr. Donald Gore, who testified that Shirley suffered injuries from the accident and would not have required cervical spine surgery in 1994 except for the accident.

The Gemases' argument fails because, as contended by Meyer in her closing argument, evidence at trial permitted the inference that Shirley's medical problems were not caused by the accident, but by the natural progression of a preexisting condition. Shirley had undergone cervical spine surgery because of degenerative disc disease in 1980. While she did not see Dr. Gore for follow-up treatment between August 1986 and the time of the accident, she sought treatment in California from Dr. Ronald Lamb in 1990 and 1991 for shoulder tendon problems.

The Gemases argue that Gore testified that Shirley's preexisting medical history did not cause and was unrelated to her postaccident problems and that Meyer presented no countervailing medical testimony or documentary evidence to dispute Gore's testimony. They also rely on a statement in the notes from Lamb's final consultation with Shirley on September 23, 1991, indicating that she was now pain-free and her failure to seek further treatment between September 1991 and the time of the accident in June 1992.

While the jury could have relied on the evidence presented by the Gemases to find causation, they were not required to do so. While Gore testified that Shirley's post-1992 problems were caused by the accident, his opinion was based upon her medical history and her subjective complaints of pain, not upon objective tests showing that she suffered a new injury as a result of the accident. Moreover, Shirley's medical records revealed complaints of neck pain in 1981, 1983 and 1986, the latter requiring physical therapy and medication. Shirley's

medical records also indicated that she complained of neck spasms to Lamb in June 1991, one year before the accident.

An X-ray taken in 1992 after the accident showed a degenerative change in the disc space above the 1980 fusion which was a change from Shirley's 1986 X-rays and which, according to Gore, was not related to the car accident. Furthermore, while Shirley sought treatment one month after the accident, the notes of Dr. Otto Stewart, the orthopedic surgeon who initially treated her, indicated that most of her symptomatology had disappeared by October 1992 and that she complained of only a little discomfort in March 1993. At that time, Stewart opined that he did not think "there [was] anything significant as a result of this injury."

While Stewart's notes state that Shirley suffered a recurrence of neck problems in May 1993, the jury was not required to accept Gore's conclusion that these problems related to the car accident. Rather, based on her history, the jury could reasonably believe that Shirley had ongoing problems with pain in her cervical spine since the mid-1970's which were the cause of the problems she experienced after June 1992. The jurors knew that she had a fusion performed on her neck in 1980 and that she continued to have treatment for pain in her neck over the course of the next eleven years, with the last treatment occurring in June 1991. While she testified that her neck problems went away after that, her credibility was for the jury to decide. Viewed in the light most favorable to the verdict, the medical record evidence of Shirley's preexisting cervical problems was sufficient to permit the jury to find that these problems were the cause of her pain and medical problems after June 1992, and that the accident neither caused nor aggravated her problems.

The Gemases' remaining arguments need be addressed only briefly. They contend that the verdict was perverse because it was contrary to the evidence presented by them indicating that the accident caused Shirley's injuries. However, as already discussed, credible evidence supported the jury's finding of no causation. Moreover, contrary to the Gemases' contention, the verdict was not inconsistent or perverse because the jurors failed to answer the comparative negligence question and failed to find causation after finding both drivers negligent. The special verdict submitted to the jurors instructed them that they should answer the question applicable to apportioning causal negligence only if they answered "yes" to two previous questions asking whether the negligence of Meyer or Shirley was a substantial factor in causing Shirley's injuries. Because they answered the causation questions "no," they did not render a perverse or inconsistent verdict by failing to apportion negligence. The Gemases' claim that the finding of dual negligence required a finding of some causation is simply not true based upon this record, which supported a finding that the medical problems for which Shirley sought compensation were not caused by the accident.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

